Flex Plastics, Inc. *and* Shopmen's Local Union No. 662 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO

Flex Plastics, Inc. *and* Mary Rennecker Comignaghi, Petitioner *and* Shopmen's Local Union No. 662 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO. Cases 8-CA-14732 and 8-RD-968

June 30, 1982

DECISION, ORDER, AND DIRECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 25, 1982, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Flex Plastics, Inc., Midvale, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DIRECTION

It is hereby directed that the Regional Director for Region 8 shall, within 10 days from the date of this Decision, open and count the ballots the challenges to which were overruled and withdrawn in Case 8-RD-968, and prepare and serve on the parties a revised tally of ballots. If the revised tally reveals that Shopmen's Local Union No. 662 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, has received a majority of the valid ballots cast, the Regional Director shall issue a Certification of Representative. However, if the revised tally shows that Local 662 has not received a majority of the valid ballots cast, the Regional Director shall set aside the election results, dismiss the petition, and vacate the proceedings.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We agree with the Administrative Law Judge's conclusion that Respondent unlawfully withdrew recognition from Local 662 and that it was obligated to continue bargaining with the Union in the administration of the expired contract and in the processing of grievances. In reaching this conclusion, we note that the Administrative Law Judge correctly distinguished this case from *Telautograph Corporation*, 199 NLRB 892 (1972), and did not rely thereon.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard on November 19 and 20 and December 16, 1981, in New Philadelphia, Ohio, based upon an unfair labor practice charge filed on March 30, 1981, by Shopmen's Local No. 662 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, herein called Local 662 or the Union, and a complaint issued on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 8 of the Board on May 29, 1981, as amended on August 11, 1981, and at hearing. The complaint alleges that Flex Plastics, Inc., herein called Respondent, violated Section 8(a)(1), (2), and (5) of the National Labor Relations Act, herein called the Act, by coercive statements, by promises and grants of benefits, by assistance to and support of the Flex Shop Committee (herein called the Shop Committee),[1] by undermining the exclusive representative status of Local 662, and by failing and refusing to bargain in good faith with Local 662.[2] Respondent's timely filed answers deny the commission of any unfair labor practices.

Consolidated for hearing with the unfair labor practice allegations are Local 662's objections to conduct affecting the results of the election conducted in Case 8-RD-968. The objections essentially track the complaint allegations.

All parties were afforded full opportunity to appear, to examine and cross-examine witnesses, and to argue orally. The General Counsel and Respondent have filed briefs which have been carefully considered. Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

[1] Although not named as a party, the Shop Committee was served with copies of all of the General Counsel's pleadings. No appearance was made on its behalf.

[2] The General Counsel's unopposed motion to withdraw the allegation relating to the granting of a merit wage increase is hereby granted.

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is an Ohio corporation engaged in the manufacture of plastic extruded products with its main office and place of business in Midvale, Ohio. Annually in the course of its business operations, Respondent ships products valued in excess of $50,000 from its Ohio location directly to points outside the State of Ohio. The complaint alleges, Respondent admits, and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that Local 662 has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Flex Shop Committee has been a labor organization within the meaning of Section 2(5) of the Act since January 9, 1981.

II. THE 10(B) ISSUE

The complaint was amended on August 11, 1981, to allege that Respondent's failure, in October and November 1980, to comply with seniority and recall provisions to which it had earlier agreed, its failure to notify the Union of the October 30, 1980, recall of employees, and its refusal to negotiate with that Union in regard thereto violated Section 8(a)(5) and (1) of the Act. At the hearing, Respondent moved to dismiss this allegation contending that, inasmuch as it was based upon a charge filed on June 9, 1981, in Case 8-CA-14886-2, it was untimely under Section 10(b) of the Act.[3]

The charge in Case 8-CA-14886-2 did allude to the refusal to bargain over the recall and was filed more than 6 months after the complaint of events. However, the General Counsel contends that the complaint was amply supported by the timely filed charge in Case 8-CA-14732. I must concur with the General Counsel. That charge, filed on March 30, 1981, well within the 6-month limitations period, alleges that Respondent refused to bargain with Local 662 "since on or about October 1, 1980." Although this charge does not specifically refer to the events surrounding the recall as violations, it is sufficiently broad to support the complaint. The law is clear that the charge is not a formal pleading and it is not the function of the charge to apprise a Respondent of the exact nature of the allegations against him. That is the function of the complaint. The purpose of the charge is merely to set in motion the Board's investigative machinery. The only limitation is that the complaint may not issue on matters "so completely outside . . . the charge that [the Board] may be said to be initiating the proceeding on its own motion." *N.L.R.B.* v. *Kohler Company*, 220 F.2d 3 (7th Cir. 1955). See also *R. J. Causey Construction Co.*, 241 NLRB 1096 (1979); *Allis Chalmers Corporation*, 224 NLRB 1199 (1976), and cases cited therein at 1218. The specific allegations of 8(a)(5) violations which are the subject of Respondent's motion are clearly related to the more general 8(a)(5) allegations contained in the timely filed charge. Accordingly, Respondent's motion to dismiss these allegations is denied.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Local 662 was certified as the exclusive bargaining representative of Respondent's production and maintenance employees[4] in May 1977. A collective-bargaining agreement, effective from May 4, 1977, until May 3, 1980, was entered into. In February 1980,[5] Local 662 gave notice of its intention to terminate the existing contract and negotiate a new agreement. Negotiations began in April. The parties reached agreement on many issues, including language on seniority and recalls, as indicated by their initials alongside the various articles in a copy of the old agreement.[6] However, they reached what Respondent deemed to be an impasse on wages and one or two other issues on July 1.[7] The parties had been assisted in the last two or three negotiating sessions by a mediator from the Federal Mediation and Conciliation Service (FMCS) and the July 1 meeting broke up with the parties' understanding that the mediator would set up another meeting when the parties were ready.[8]

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[3] To the extent relevant here, Sec. 10(b) provides that:

> . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge . . . .

[4] The complaint alleges and Respondent admits that the following is a unit appropriate for collective-bargaining purposes within the meaning of Sec. 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees, excluding all office clerical employees, and professional employees, guards and supervisors as defined in the Act.

[5] All dates hereinafter are in 1980 unless otherwise specified.

[6] The parties agreed, essentially, to retain sec. 17, which had provided, *inter alia*:

> The continuous service and seniority status of an employee shall not be affected or interrupted as a result of layoff . . . or other cause not due to the voluntary act or fault of the employee . . . however, the continuous service of an employee and his or her seniority status shall be terminated . . .
>
> * * * * *
>
> (6) When an employee has not performed any work for the Company, within the bargaining unit, for twelve (12) consecutive months . . . .
>
> * * * * *
>
> (B) In all cases of promotions, demotions, when filling vacancies which may occur, when new work operations are created, when work operations are abolished, when work operations that have been abolished are re-established, and in all cases of increase or decrease of forces, preference shall be given employees with the greatest length of continuous service and who have the ability to perform the work in question.

[7] The General Counsel did not contend that Respondent had, to this point, bargained in bad faith or with any intention of avoiding final agreement.

[8] Respondent's president, Glenn Burket, recalled that the mediator had stated, in the presence of Local 662's business agent, Donald Lightell, that he would be in touch with Burket when "they [presumably the Union] have a counterproposal or something else to offer."

On July 8, Respondent informed Local 662, by letter, that it was implementing most of its contract proposals. Local 662 did not object. Neither did it request further negotiations until November as discussed *infra*.

In May, while the parties had been negotiating, there had been a brief strike among Respondent's employees apparently over grievance-type matters.[9] The strike, which began with picketing by 5 to 7 of Respondent's then approximately 25 employees, lasted about 8 days. At the end of the strike, few of the employees were honoring the picket line. Local 662 filed an unfair labor practice charge, Case 8-CA-13836, alleging discrimination and unlawful promises of benefit to discourage union membership by Respondent in regard to the striking employees. A complaint was issued on June 27 and an informal settlement agreement, remedying the alleged unfair labor practices without admitting same, was entered into in mid-September. Because of unexplained problems, the case was not closed upon compliance until February 2, 1981.

On July 17, employee Mary Rennecker Comignaghi filed a petition, Case 8-RD-968, seeking decertification of Local 662 as the bargaining representative of Respondent's employees.[10] Respondent filed an RM petition on July 28 also questioning the Union's continued majority status. The processing of these petitions was blocked by the unfair labor practice charge pending in Case 8-CA-13836 until January 1981.

On August 27, Respondent's president, Burket, wrote Local 662. Citing the unsuccessful negotiations, the two RD petitions raising a question as to the Union's representative status, and the Employer's RM petition, he stated:

> It is the position of the employer that due to the above facts we can no longer give credence to the expired Union Contract; nor can we continue to recognize your Union as a majority representative of our employees until the National Labor Relations Board resolves these questions.
>
> Therefore, please be advised that effective immediately due to the above, we will no longer deduct Union Dues or Initiation fees pursuant to the expired contract.

In what appears to have been August, Plant Superintendent Charlie Prince suggested, in response to employee complaints, that a committee be formed by the employees. Employees Diane Shaffer, Joe Hren, and Donald Moore did so. According to the testimony of both Burket and Rayford Blankenship, Respondent's labor relations consultant (and its admitted agent), these employees then sought to bargain with Respondent on behalf of their fellow employees; they were told that Respondent could not recognize them for that purpose. The committee and Mary Rennecker (Comignaghi) posted a notice, dated August 22, soliciting the support and assistance of the other employees. This committee met with Prince weekly thereafter, dealing with such problems as water on the floor, paint for the washroom walls, and other matters related to health and safety.

On September 15, 18 employees signed a petition stating: "We the undersigned support our 'Local Union #662' and request that the Company 'Flex Plastic' to start and negotiate in good faith." On the same date, six employees signed a petition seeking the removal of their names from the petition in support of Local 662's decertification.[11] Both petitions were sent to Local 662 and neither was ever seen by Respondent.

On the afternoon of October 27, Respondent held a general meeting of its employees. The principal speaker was Blankenship, introduced, according to Respondent's transcript of the meeting,[12] by Burket as a labor lawyer "very experienced in labor law."[13] Burket vouched for the truth of what Blankenship was about to tell the employees.

According to the transcript, identified by Blankenship and others as complete and accurate, Blankenship recited the history of Respondent's relationship with Local 662 through the breakdown of negotiations on July 1. He told the employees that Respondent had made its final offer on that date and that it was up to Local 662 to make the next move. When he said that there had been no contact from Local 662 since then, Burket corrected him, stating that one letter had been received and that the Company had told the Union to go back to the mediator. Blankenship told the employees that Respondent had told Local 662 that it no longer represented the employees and cited the petitions, the impasse in bargaining, and Local 662's "disclaimer by silence," which, he stated, indicated that Local 662 no longer wanted to represent the employees, as evidence of the requisite "objective considerations." He said that because of the impasse the contract was "nullified," that its terms and conditions were no longer in effect, and that dues and initiation fees were no longer being deducted.

The speech continued with Blankenship telling his audience:

> Now the company had been dealing with you on an employee type group action since that time because the company did not leave you out on your own with a feeling that you are unprotected . . . . The Company will continue to do it. There is nothing wrong with that, nothing illegal.

[9] Respondent's assertion that this was a union-sanctioned strike in support of contract demands is not supported by the record. Joseph Hren, Respondent's witness and union steward and a member of the Union's negotiating committee, testified that the strike was in response to the conduct of foremen and other incidents and that the Union's business agent was not present at its inception. He did not know whether the strike was called by the Union.

[10] A similar petition filed by Comignaghi on June 11 had been withdrawn. There was no evidence or contention of Employer interference with or support for the filing of these petitions.

[11] The record does not establish how many employees had supported that petition. Sec. 101.18 of the Board's Statement of Procedures requires only that it be supported by 30 percent of the employees. See *Telautograph Corporation*, 199 NLRB 892 (1972).

[12] The transcript was made from a tape recording taken at the meeting. The tape itself was not offered; it had been inadvertently erased by Blankenship's secretary.

[13] Blankenship claims a degree in law but does not hold himself out as a member of the bar.

In response to a question as to why the employees had not heard of this before, Blankenship reiterated his position that Respondent had waited until it was sure of Local 662's "disclaimer of interest."

In the course of this speech, Blankenship told the employees that, pursuant to the dues-checkoff system in the contract, Respondent had deducted $45,000 of the employees' money and turned it over to the Union.[14] Blankenship repeated that the employees were no longer joining Local 662; instead, he said, they were "dealing with the company." Since the impasse, Blankenship reported, they had:

> . . . been operating as employees . . . under Section 7 of the Taft-Hartley Act. Section 7 . . . gives you protection as employees. . . . It protects concerted activity and union activity. Section 7 of that Federal Law doesn't protect necessarily only union activity. It also protects you for concerted activity.

He explained concerted activity as two or more employees talking with their employer about wages, hours, and working conditions and assured the employees that they would have the protection of the Federal Government if they continued to so bargain.

According to the transcript, one of the employees asked whether this meant that the employees had the right to do their own bargaining. Blankenship assured them that that was what they had been doing, "Exercising [their] rights under Section 7 concerted activity."

A question was asked about job security and Blankenship told the employees that it was not true that without the Union the Company could discharge them "for anything that they want to." This, he said:

> . . . is an out and out blatant lie. If this Company did anything to harm your rights or to interfere in your concerted rights under the Federal law, all you have to do is pick up the phone. . . . [The NLRB will] tell you. The Company cannot do something like that because your jobs are protected. Now, that is not to say that if you screw up enough you're not going to get fired . . . concerted activity takes place wherever employees out here in the plant act in concert about their wages, hours, and working conditions.

In response to a question relating to long-term benefits and retirement, Blankenship said again:

> I will tell you what the law is, and then what you do is up to you, okay? Because I'm not going to get involved in it, but the Taft-Hartley Act says as long as you folks right here, if you want to negotiate with the company on your own behalf you have the right, in a concerted effort, to require the company to write it all down in the form of a contract or whatever it might be. That becomes a binding contract.

In response to another question, Blankenship stated again Respondent's position that Local 662 had disclaimed its interest in representing the employees by its inaction and stated further that no election was needed.[15] The Union, he claimed, was no longer interested in representing them. Its representative, he claimed, had said that he was going on to bigger and better things.[16]

As might be expected, several employees testified that the transcript of the meeting was incomplete. Thus, employees Donald Moore, Thomas Strimbu, and Stella Zeigler all recall Blankenship stating that, since the advent of the Taft-Hartley Act, unions were no longer necessary inasmuch as the Labor Board would protect employees whether or not they were affiliated with a union. Counsel for the General Counsel does not contend that the recollections of those employees is more accurate than Blankenship's transcript. Rather, she contends that their testimony illustrates the effects of the speech.

The unit for which Local 662 had been certified included employees working in two buildings and the employees in both were included under the 1977–80 collective-bargaining agreement. In March and early April, the approximately 25 employees in plant #2, which was basically an assembly operation, were laid off and that plant was shut down.[17] The closing of plant #2 was discussed in negotiations on April 15; at that time, Burket told Local 662 that he did not desire to negotiate anything for that plant—that it was "closed indefinitely." He did, however, agree that the Union would have bargaining rights when it reopened.[18]

In October, Respondent received a "spot" contract to assemble certain parts for Ford Motor Company. The work was similar, but not identical, to assembly work done in the past. To secure employees to perform this work, Respondent placed an advertisement in the local newspaper which stated that former employees would be considered. Twenty employees were hired, 18 of whom had previously worked in plant #2. The former employees were paid the wage rates they had previously received and got paid holidays but no other benefits. When hired, they were told that the work would only last for a short time and that their employment was temporary. Respondent did not comply with the seniority and recall

[14] Neither the General Counsel nor Local 662 contested this figure. However, it seems overstated. With dues of $11.60 per month the work force would have had to average 108 for the total dues paid in 3 years to have reached $45,000. The employee complement prior to the April 1980 layoff (discussed *infra*) was approximately 50.

[15] Several employees recalled Blankenship stating that there would be no election or that no election was needed.

[16] Blankenship claimed, and Lightell denied, that such a statement had been made before negotiations ended. Similar statements were attributed to Lightell by several employees. He denied them. There was no evidence that these alleged statements to employees were ever communicated to Respondent.

[17] Respondent's witnesses testified that the shutdown was intended to be permanent and total and that the employees were informed that they had no expectancy of recall. One employee, Virbal Swihart, testified that Burket told her that the layoff was only temporary. In light of the language of sec. 17 of the agreement, clearly making that section applicable to employees laid off either temporarily or permanently, resolution of this credibility conflict is unnecessary.

[18] Testimony of Lightell which is uncontradicted.

provisions of section 17 of the expired contract in restaffing plant #2. Neither was Local 662 notified or consulted.

On October 30, Local 662's president, Ralph Calhoun, wrote Respondent, asserting the Union's continued bargaining rights for plant #2, objecting to Respondent's failure to notify the Union of the reopening, insisting that the employees be called back to work in accordance with their seniority, requesting negotiations on the reopening, and proffering two dates for meetings. Respondent's reply, signed by Herbert Corbett, its vice president, was nonresponsive:

> [P]lease be advised that we have previously contacted Mr. Lightell and stated that it is our understanding that when the union has something new to propose, they contact the Federal Arbitrator and through him, set up a mutually agreeable date.
>
> Unless we have misunderstood the procedures, we will wait until we hear from the arbitrator.[19]

Calhoun then wrote Burket under date of November 7. He informed Burket that the Union had some moves to offer and requested a meeting to discuss them. In so stating, he wrote that he had learned from Lightell that the FMCS had declined to be involved in setting up additional meetings[20] and that fact, he said, "should not prevent the Company and the Union from meeting." He also reiterated his request to meet and bargain about the reopening of plant #2. Corbett replied again. In this letter of November 10 he stated:

> [I]t seems that no matter how often we tell you, it still remains your initiative to contact the Federal Mediator to establish further meeting with Flex. We will not meet without him present. The Mediator well knows the points at impasse and is therefore best qualified to determine if your "moves" constitute new subject matter.
>
> Plant No. 2 is not re-opened. It will not be re-opened. There is a temporary short term one-shot engineering project going on there; which will be over by the end of the year . . . . There is absolutely nothing to negotiate.
>
> When we hear from the Mediator and Local #662, an additional meeting can be scheduled when suitable to all involved.

Finally, on November 17, Blankenship addressed a further response to Calhoun's November 7 request. In it, he reiterated Respondent's position that FMCS should be involved in any further negotiations but stated that, if that could not be arranged, the Union should submit its new proposals in writing to Burket and him, after which he would contact the Union. He went on to say:

> The company sent you a letter in which they took the position that your union no longer represented a majority of bargaining unit employees. Decertification petitions were filed by bargaining unit employees, followed by a company Decertification Petition. After a long hiatus of time and your union's inaction, the company cancelled any further recognition of your union's majority status, and the expired contract.

Blankenship professed ignorance of Calhoun's October 30 letter, asserted that it was never considered by Respondent, and stated in this letter that the seniority rights of the collective-bargaining agreement had expired and were not followed. He further professed to be shocked by the Union's November 7 request for negotiations in regard to plant #2. There was no further correspondence between the parties.

Virbal Swihart had been a union steward and member of the Union's negotiating committee prior to her layoff in April. She applied and was hired to work in plant #2 in October. Swihart testified that she was called into the office of Deborah Peterman, the foreman in plant #2,[21] on November 3. There, she testified, Peterman said, "There is no union. There will be no union talk. Do you still want to work?" Swihart replied, "Yes," and returned to work. Peterman admitted talking to Swihart but claimed that the conversation involved an offer of an inspection job; she denied making any mention of the Union or union activity. I credit Swihart.[22]

In or about November or December, the employees formed a new Flex Shop Committee, electing Joseph Hren, Douglas Roseberry, and William Longfellow as the committeemen.[23] The following petition, drafted, according to Hren, by the committee, was posted on a bulletin board and signed by 17 employees between January 7 and 9, 1981:

> We, the undersigned, have in the past designated certain individuals to discuss our labor relations problems with company management of Flex Plastics. In addition, we now authorize the same individuals to bargain with management in our behalf for purposes of wages, hours, and working conditions, which have a direct effect upon us as employees.

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[19] Burket's remarks on October 27 similarly refer to an earlier exchange of correspondence between Respondent and Lightell. Those letters are not in evidence.

[20] Lightell so testified.

[21] Respondent denied that Peterman was a statutory supervisor. The evidence, however, indicates that she was its production supervisor and quality control manager with the authority to hire, direct, lay off, and terminate employees. There can be no doubt of her supervisory status.

[22] In attempting to persuade me to accept her testimony over Swihart's, Peterman testified that she had a low opinion of Swihart's reputation for truth and veracity. She came to that opinion, she stated, because everything that Swihart had inspected was returned by the customer. Additionally, she claimed, Swihart told tales on fellow employees and then denied doing so. She claimed that she had learned this some years earlier when working with Swihart as an assembler. Such testimony does not come within the hearsay exception as "Reputation of a person's character among his associates or in the community." Fed. R. Evid. 803(21). Moreover, noting that Peterman's rehiring of Swihart in October as an inspector appears to be inconsistent with her stated opinion, I find that Peterman was stretching to establish Swihart as less credible than she. That stretching adversely affects my view of Peterman's credibility.

[23] Other than the encouragement of such action found in Blankenship's October 27 speech, the General Counsel does not contend that Respondent assisted, supported, or interfered in the formation of this committee.

The committee presented the signed petition to Burket. Burket, observing the apparently valid signatures of 17 employees in a unit of 26, immediately granted recognition to the Shop Committee for collective-bargaining purposes. A notice so stating, signed by him, was posted on January 9, 1981.

The Shop Committee then met with Burket and Corbett to bargain out a contract. A 3-year agreement was reached and signed on January 22, 1981. Its terms, which included wage increases, increased vacation and holiday benefits, and a new profit-sharing plan, were implemented upon execution.

Respondent withdrew its RM petition on January 26, 1981. On January 30, 1981, the Regional Director issued a notice of hearing on Comignaghi's RD petition for February 9 and on that date the parties, including Local 662, the Shop Committee as Intervenor, the Petitioner, and Respondent, agreed to an election to be conducted on February 22, 1981.[24]

On February 18, 1981, Burket held a meeting of the employees in plant #1. In the course of that meeting he told the employees that the Shop Committee had been able to secure a better contract than Local 662 because they were more attuned to the needs and welfare of the employees than Local 662 had been and negotiated in "better spirit." He told the employees that he had been told by an agent of the NLRB that the signing of the contract with the Shop Committee was legal.[25]

The election was held on February 22, 1981. The results, undeterminative, were 13 votes for the Shop Committee, 11 votes for Local 662, 1 vote for no union, and 8 challenges. In his Report on Objections and Challenges, the Regional Director, with the agreement of all parties, sustained five challenges. Two challenges were overruled and one was withdrawn (by the Union). The overruled and withdrawn challenges have not, however, been opened and counted because of the pendency of the unfair labor practice complaint herein, which seeks a bargaining order remedy.

B. *Discussion*

1. Withdrawal of recognition

On August 27, Respondent purported to withdraw recognition from Local 662, claiming that its actions were justified on the basis of the stalled negotiations, Comignaghi's RD petitions, and its own RM petition.[26] In November, after Blankenship's speech to the employees, discussed *infra*, Respondent replied to the Union's request for bargaining *about the recall of employees* by referring it to the Federal mediator, *as if it had sought contract negotiations*. That position was repeated when the Union, picking up on Respondent's apparent reference to contract negotiations, indicated its desire to get negotiations moving again. At the same time, Respondent refused to negotiate over the recall. All of Respondent's positions and its withdrawal of recognition were reasserted in Blankenship's letter of November 17. At that time, Respondent stated that the withdrawal of recognition on August 27 had been justified by RD and RM petitions, the "long hiatus of time and your union's inaction . . . ."

Local 662 was the certified collective-bargaining representative of Respondent's employees and was the incumbent union. Its certification and its expired agreement raised a rebuttable presumption of continued majority status. The burden of rebutting such a presumption rests on the party who would do so, here Respondent, and "clear [cogent] and convincing proof" is required. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962, 963 (1970), enfd. in relevant part 470 F.2d 669, 675 (9th Cir. 1972); *Schmutz Foundry and Machine Company*, 251 NLRB 1494 (1980). To meet that burden, Respondent would have had to establish, by such evidence, either that the Union *in fact* no longer enjoyed majority status *at the time of the refusal* or that the refusal was "predicated on a good-faith and reasonably grounded doubt of the union's continued majority status . . . based on objective considerations." Moreover, the asserted doubt must be advanced in a context free of unfair labor practices and not in order to gain time within which to undermine the union. *Terrell Machine Company*, 173 NLRB 1480, 1480–81 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970); *Pioneer Inn Associates, d/b/a Pioneer Inn and Pioneer Inn Casino*, 228 NLRB 1263, 1265 (1977), enfd. 578 F.2d 835 (9th Cir. 1978).

We are not confronted here with the question of whether Local 662 had, in fact, lost its majority status at the points in time when Respondent refused to bargain with it. Respondent did not contend that it had or offer any proof of such a loss. Rather, the issues are whether the requisite objective considerations existed to give rise to Respondent's asserted good-faith doubt and whether that doubt was raised in order to gain time within which to undermine the Union. I conclude that the first of these questions must be answered in the negative and the second in the affirmative.

Neither the stalled negotiations, the hiatus in bargaining requests, the Union's alleged inactivity, nor the petitions, taken separately or together, suffice to raise a reasonable good-faith doubt of the Union's majority status. Thus, even assuming that the parties reached an impasse in the negotiations on July 1, such a state of affairs

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[24] There is no warrant in this record for Respondent's statements on brief to the effect that the hearing was conducted over Respondent's objections and that Respondent and the Shop Committee agreed to an election in order to "appease the Hearing Office[r]."

[25] Employee Moore's recollection of Burket stating that if the employees voted for the Shop Committee they knew what they had, but that they would be back "in limbo" if they voted for Local 662 as Burket did not have to agree upon anything in negotiations with that Union, was denied by Burket and not corroborated by Strimbu or any other employees. I credit Burket.

[26] Although this initial attempted withdrawal occurred more than 6 months prior to the filing of the unfair labor practice charge herein, no 10(b) problem exists. Sec. 10(b) establishes a statute of limitations; it is not jurisdictional. "It is an affirmative defense and, if not timely raised, is waived." *Vitronic Division of Penn Corporation*, 239 NLRB 45, fn. 1 (1978), enfd. 630 F.2d 561 (8th Cir. 1979), and cases cited therein. Respondent did not plead this affirmative defense on this issue. Moreover, as discussed *infra*, the Union made a demand for bargaining and Respondent repeated its refusal within the 10(b) period, thus raising a new and timely unfair labor practice. *J. Ray McDermott & Co., Inc.*, 227 NLRB 1347 (1977), enfd. 571 F.2d 850 (5th Cir. 1978); *Serv-All Company, Inc.*, 199 NLRB 1131 (1972), enforcement denied 491 F.2d 1273 (10th Cir. 1974); *McCready and Sons, Inc., et al.*, 195 NLRB 28 (1972), enforcement denied 482 F.2d 872 (6th Cir. 1973).

would not support Respondent's withdrawal of recognition. The Board stated in *International Medication Systems, Ltd.*, 253 NLRB 863 (1980), that it:

> . . . [has] long held that, while an impasse may suspend bargaining for a time, it "does not relieve an employer from the continuing duty to take no action . . . which amounts to a withdrawal of recognition of the Union's representative status." *Central Metallic Casket Co.*, 91 NLRB 572, 574 (1950). Thus, whether the parties arrived at an impasse is irrelevant to an evaluation of Respondent's asserted good-faith and reasonably grounded doubt of the Union's majority status.

See also *Charles D. Bonanno Linen Service, Inc.* v. *N.L.R.B.*, 102 S.Ct. 720, 92 LC ¶ 13,127 (1982), wherein the Supreme Court agreed with the Board that impasse is "a recurring feature in the bargaining process . . . only a temporary deadlock or hiatus in negotiations 'which in almost all cases is eventually broken either through a change of mind or the application of economic force.'" The Court further agreed with the Board's observation that "there is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways."

Neither can the Union's alleged inactivity and the hiatus from July 1 until either August 27 or November 17 support a good-faith doubt. In light of the filing of the RD and RM petitions, there was little, if anything, that the Union could have done. The Union could properly have interpreted Respondent's filing of the RM petition on July 28 (only 3 weeks after the alleged impasse) as evidencing Respondent's unwillingness to bargain further and, as discussed *infra*, the RD petition precluded further bargaining toward a collective-bargaining agreement. Thus, it would have been an "exercise in futility" for the Union to demand further negotiations at that time. See *Serv-All Company, Inc., supra* at 1133 (dissent of then Chairman Miller and Member Kennedy); *Telautograph Corporation*, 199 NLRB 892 (1972). Moreover, even assuming that the Union was inactive from July 1 until either August 27 (less than 2 months) or its demand for bargaining on October 30 (4 months), no evidence raising a reasonable good-faith doubt would exist. In *Pioneer Inn, supra*, the union had been inactive for approximately 4 years prior to reasserting itself as the employees' collective-bargaining representative. There the Board concluded, as I do here, that the reassertion of its bargaining rights negated any inference to be drawn from the alleged inactivity and there the Board pointed out, as I do here, that there was no evidence that any unit employee had sought the union's assistance without receiving its full support during the period of alleged inactivity. The period of alleged quiescence involved herein cannot be compared to the 16-month hiatus present in *Road Materials, Inc.*, 193 NLRB 990 (1971), or the 4-year hiatus in *Pioneer Inn, supra*, neither of which was deemed adequate to support a conclusion that the union involved had abandoned its representative status.

Respondent cannot rely upon its own RM petition as establishing a reasonably good-faith doubt of the Union's continued majority status. An RM petition filed to question a previously certified union's continued majority status must, itself, be supported by objective considerations indicating such a loss. It is therefore a "bootstrapping" argument for an employer to assert that the mere filing of an RM petition establishes the necessary good-faith doubt. *United States Gypsum Company*, 157 NLRB 652 (1966). See also *Schmutz Foundry, supra*, and cases cited therein at 1499.

Neither can Respondent rely upon the two RD petitions (one withdrawn) filed by Comignaghi as justification for its withdrawal of recognition. To be deemed valid by the Board such petitions need only be supported by 30 percent of the unit employees. There was no showing that the level of support in this case was any higher and 30-percent support will not justify a withdrawal of recognition. *Wabana, Inc.*, 146 NLRB 1162 (1964). See also *Telautograph, supra*. Therein, the Board held that when a real question concerning representation is raised by the filing of a timely decertification petition "an employer may not go so far as to bargain collectively with [the] incumbent (or any other) union until the question concerning representation has been settled by the Board; but *the incumbent union may still continue to administer its contract and process grievances.*"[27] (Emphasis supplied.)

On brief, Respondent asserted additional "evidence" to justify its withdrawal of recognition. Even assuming that these additional factors were not the mere afterthoughts which they appear from their untimely surfacing to be, I cannot find that they are "objective considerations" sufficient to establish a reasonable good-faith doubt of majority status.

Respondent contended that the Union was "unable to keep a consistent bargaining committee"; i.e., that "[t]hose who testified at the hearing who also sat on the bargaining committee stated they resigned." Respondent mischaracterized the record by so stating. Three employee witnesses, Moore, Swihart, and Hren, testified that they had served on the negotiating committee. None of them indicated resignation prior to July 1; Moore and Hren served at least until that date and Swihart continued on the committee for some period of time even after she had been laid off in April. Moreover, even assuming that Respondent's proposition was an accurate representation of the record, such resignations from the bargaining committee would carry little weight. Disinterest in further participation in negotiations by members of the union committee does not, alone, establish general employee disinterest in union representation. *International Medication Systems, supra* at 868.

Respondent similarly mischaracterized the short-lived strike as having been union-sanctioned in support of contract demands. The record does not support that contention. And again, even if it did, the fact that even a ma-

[27] The General Counsel does not contend, either in the complaint or on brief, that Respondent was obligated to bargain with the Union toward a new contract while the RD petition was pending. His contention in this regard is limited to Respondent's failure and refusal to accord the Union with notice of and the opportunity to bargain about such grievance-type matters as the recall of the plant #2 employees and its obligation to refrain from unilateral action.

jority of employees crossed the Union's picket line would not be sufficient to rebut the presumption of continued majority status. The "Board had held, with court approval, that an employee's return to work during a strike does not provide a reasonable basis for presuming that he has repudiated the union as his bargaining representative." *Pennco, Inc.*, 250 NLRB 716 (1980), citing *N.L.R.B.* v. *Frick Company*, 423 F.2d 1327 (3d Cir. 1970); *Garrett Railroad Car & Equipment, Inc.*, 255 NLRB 620 (1981).

Respondent also contends that expressions of disinterest in further representation by the Union's business agent, Lightell, to Comignaghi ("I don't care if you people have a union or not. It would save me from driving from Canton and back"), to Hren (that it did not matter that Respondent had ceased deducting dues), and to Blankenship (that he was not really interested in representing the employees anymore) supported the withdrawal of recognition. Even assuming that these statements were made, they do not justify Respondent's conduct. The record is barren of any evidence that Lightell's alleged statements to Comignaghi and Hren were communicated to Respondent prior to the withdrawal of recognition. Moreover, they, and the statement attributed to Lightell by Blankenship, do not reflect employee disaffection from the Union. Rather, they reflect at most what appears to be a business agent's alleged weariness with his role. See *Harvey's Wagon Wheel, Inc., d/b/a Harvey's Resort Hotel & Harvey's Inn*, 236 NLRB 1670 (1978), where a business agent's statement that the union "was in trouble" was not equated with a loss of majority.

Accordingly, I must conclude that Respondent has failed to establish that it had a good-faith doubt of the Union's majority status reasonably premised upon objective considerations.[28] Respondent was therefore not privileged to withdraw recognition and was obligated to continue dealing with the Union in the administration of its contract and in the processing of its grievances. In *The Baughman Company*, 248 NLRB 1346, 1347 (1980), the employer revised its employee handbook, changing such things as the length of the workweek and workday, overtime entitlement and the definition and application of seniority. The Board stated:

> Even if these changes were formalized during the pendency of the decertification petition . . . Respondent still owed an obligation to the incumbent Union to meet with it and discuss these significant modifications in the terms of employment.[6]

[6] *Telautograph Corporation* [*supra*], absolves an employer from bargaining for a new contract while such a petition is pending, but the Board clearly did not intend to hold in that case that an employer would be permitted to take advantage of such a period for the purpose of instituting unilateral changes.

Section 17 of the expired contract, quoted earlier in this Decision, created certain rights to recall for laid-off employees. Those rights, the employment conditions which existed at the expiration of the contract which were not changed by any permissible unilateral implementation of Respondent's proposals upon impasse, survive the contract's expiration. As was stated in *Anthony Carilli, d/b/a Antonino's Restaurant*, 246 NLRB 833, 840 (1979), enfd. 648 F.2d 1206 (9th Cir. 1981):

> [I]t is settled that Respondent's collective-bargaining obligation did not cease on the expiration of its bargaining agreement with the Union; rather, Respondent was obliged to maintain existing employment conditions and "bargain with the Union before he may permissibly make any unilateral changes in [mandatory] terms and conditions of employment." [*Harold W. Hinson, d/b/a Hen House Market No. 3* v. *N.L.R.B.*, 428 F.2d 133, 137 (8th Cir. (1970)).]

See also *Martinsburg Concrete Products Co.*, 248 NLRB 1352 (1980), wherein no RD petition had been filed prior to the employer's postcontract expiration withdrawal of recognition, and where the Board stated: "[I]t is well-established that an employer's continuing postcontract bargaining obligation includes the duty to meet with a collective-bargaining representative and discuss unit employees' grievances." At the very least, under the circumstances present here the Union was entitled to notice of the recall and an opportunity to discuss with Respondent that recall and the question of whether the employees were entitled to be recalled according to their earlier earned seniority under the contract or past practice. Respondent gave it no notice, did not comply with the contract, and, when the Union learned of the recall and requested bargaining, Respondent evaded its request and then refused, outright, to meet with the Union to discuss or negotiate the recall. Such conduct, I find, clearly contravenes Respondent's obligation to continue recognizing the Union as the exclusive representative of its employees, as described above, and violates Section 8(a)(5) and (1) of the Act.

2. The October 27 speech and other 8(a)(1) conduct

The General Counsel contends that the speech delivered by Blankenship on October 27 violated Section 8(a)(1) and (5) of the Act by misstating the current state of affairs *vis-a-vis* representation by the Union, by misrepresenting that there would be no decertification election, by suggesting that the protections offered employees by the National Labor Relations Act made unions unnecessary, and by suggesting that the employees bargain directly with Respondent rather than through the Union. Respondent argued only that the transcript of the speech was the best evidence of what was said, that inferences as to its meaning or what else might have been said were "inadmissible in evidence," and that the speech was protected by the "free speech provisions of the Act."[29] The

[28] I would also conclude, based upon Blankenship's speech of October 27, discussed in the next section, that the alleged good-faith doubt was raised in order to gain time within which to undermine the Union.

[29] Sec. 8(c) of the Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit.

speech speaks for itself and what it says leads me to conclude, in agreement with the General Counsel, that Respondent has violated the Act, as alleged.

In *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969), the Supreme Court stated the following guiding principle:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c). And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

Here, the employees were presented with a speech by an individual who was vouched for by their Employer as a lawyer (which he is not) with special expertise in the field of labor law. His remarks were thus imbued with an extra measure of trustworthiness or reliability. What he had to say, however, was a composite of misstatements of fact and law carefully constructed to lead the employees away from the Union and toward bargaining with Respondent on their own. Thus, Blankenship repeatedly told the employees that the Union no longer represented them; he created an impressively legalistic sounding explanation, "waiver by silence." In fact, as demonstrated in the last section of this Decision, there had been no waiver or abandonment by the Union; the facts did not give rise to the alleged reasonable good-faith doubt of the Union's majority status required for Respondent's attempted withdrawal of recognition. See *Tuschak/-Jacobson, Inc. t/a Franklin Convalescent Center*, 223 NLRB 1298 (1976), wherein a union was found to be in violation of Section 8(b)(1)(A) for misrepresenting that it had acquired exclusive representative status. Additionally, Blankenship misstated the status of the prior contract, telling the employees, contrary to the law as discussed *supra*, that the terms and conditions set forth in that contract were no longer in effect. And, notwithstanding that both the RD petition and Respondent's own RM petition were still pending, Blankenship told the employees that there would be no election.

Having thus portrayed the employees as being out on their own, abandoned by the Union, Blankenship then assured them that they could join together, without a union, to bargain with Respondent. He cast out the implication, readily picked up by the employees, that by joining together in concerted activity the employees would be nearly as well protected by the Labor Board as they might be by a union. This grossly overstates the case; the functions of the Board and the functions of unions are distinct. The protections embodied in Sections 7 and 8 of the Act are designed to foster and protect employee free choice in organizational activities and union representation; they are not intended to supplement collective-bargaining agreements.

Blankenship went further; he assured the employees that since the demise of the Union the employees had been dealing concertedly with the Employer and could lawfully continue to do so. This, it appears, was a reference to the committee which had been formed and was meeting regularly with Respondent's superintendent, Prince, at Prince's suggestion to resolve such working condition problems as health and safety. Of course, for an employer to suggest the formation of such a committee and then deal with it is a blatant violation of Section 8(a)(2) of the Act. *Coating Products, Inc.*, 251 NLRB 1271 (1980), enfd. 648 F.2d 108 (2d Cir. 1981); *Cagles, Inc.*, 234 NLRB 1148 (1978), enfd. in relevant part 588 F.2d 943 (5th Cir. 1979). Finally, Blankenship assured the employees that Respondent would deal with them if they came to it concertedly and would sign a contract with them.

All of the foregoing, I find, served to undermine the employees' support for the Union and to encourage them to bargain directly with Respondent in violation of Section 8(a)(1) and (5) of the Act. *Western Truck Services, Inc.*, 252 NLRB 688 (1980). As discussed *infra*, this violation culminated in Respondent's ultimate recognition of, and contracting with, an employee shop committee. See *Federal Alarm*, 230 NLRB 518 (1977), where the employer, attempting to portray itself as neutral, indicated its preference for dealing with the employees rather than the union, stated that union representation would be a sharp break from the past, said that the employer's door was always open for discussions and settlement of complaints with employees, claimed that it was better for both the company and the employees to deal directly without a third party, and held out the prospect of better wages and conditions. The Administrative Law Judge, in a Decision adopted by the Board, stated that, while the employer may not "in so many words" have suggested "that the employees organize a committee to negotiate with him," "his actions and words made that suggestion and encouraged that idea, as clearly as though he had written a memorandum to that effect." A violation of Section 8(a)(1) was found in that case and such a finding is similarly required here. See also *Mark Twain Marine Industries, Inc.*, 254 NLRB 1095 (1981), which involved a series of speeches by Blankenship, the import and much of the language of which were strikingly similar to the instant case. There, Blankenship, similarly held out as an expert worthy of belief, was found to have urged employees to join concertedly to bargain with their employer rather than through their recognized union in violation of Section 8(a)(1). He was also found to have violated Section 8(a)(1) by implying that the protections afforded by the National Labor Relations Act to unrepresented employees acting concertedly were as great as or greater than they would have if represented by a union and by implying that employees somehow gave up their rights to use the processes of the Board when they choose union representation.

I have found that Supervisor Deborah Peterman told Virbal Swihart, upon Swihart's return to work in plant

#2, that there would be no union and no union talk there. She asked Swihart if Swihart was willing to work under those conditions. Such statements and questions, unduly limiting employee union activity and conditioning employment upon an agreement to refrain from such activity, are inherently coercive and violative of Section 8(a)(1) of the Act. I so find.

3. Recognition of the Shop Committee and Related Conduct

The General Counsel contends that Respondent's recognition of the Shop Committee on January 9, 1981, based upon its receipt of a petition purportedly signed by a majority of the unit employees, its negotiation and execution of a contract with the Shop Committee, and its implementation and publication of that contract, all occurring while a valid question concerning representation existed, violated Section 8(a)(1), (2), and (5) of the Act. Principal reliance was placed upon *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060 (1945), and its long line of progeny which establish it to be "an unfair labor practice for an employer to recognize one of two or more competing unions while a question concerning representation is pending before the Board by virtue of the filing of a representation petition" *Newport Division of Wintex Knitting Mills, Inc.*, 223 NLRB 1293, 1295 (1976). Respondent asserts, essentially, that it was obligated to recognize the Shop Committee upon presentation of a majority-supported petition. I concur with the conclusions of the General Counsel but find it unnecessary to rely upon *Midwest Piping, supra*, to do so. See *Classic Industries, Inc.*, 254 NLRB 1149 (1981).

I have previously found in this Decision that Local 662 enjoyed a rebuttable presumption of continued majority status, which presumption had not been rebutted prior to Respondent's withdrawal of recognition. Neither had Respondent established that by that time it had a reasonably founded good-faith doubt of the Union's majority status predicated upon objective considerations. Respondent's receipt of the Shop Committee petition did not alter that state of facts. That petition arose in the context of Respondent's unlawful withdrawal of recognition from Local 662 and its unlawful undermining of the Union's status by Blankenship's October 27 speech. Indeed, it is clear that the birth of the Shop Committee was the anticipatable and intended effect of that speech, the central message of which had been to suggest that the employees organize among themselves to bargain with Respondent without the Union. It also appears that the Shop Committee, as it arose in December, was a mutation of the earlier committee which had been created upon the suggestion of Respondent's superintendent, Prince. In the context of such unfair labor practices, that petition could not establish a reasonable doubt of the Union's continued majority status; such a doubt may not exist except "in an atmosphere free of employer conduct aimed at causing disaffection." Neither could it, in such an atmosphere, establish that the Shop Committee was the freely selected choice of a majority of the unit employees. *Fremont Newspapers, Inc.*, 179 NLRB 390 (1969), cited with approval in *Sacramento Clinical Laboratories, Inc.*, 242 NLRB 944 (1979), enforcement denied in part 623 F.2d 110 (9th Cir. 1980); *Mid-Continent Refrigerated Service Company*, 228 NLRB 917 (1977). See also *N.L.R.B.* v. *Newport Division of Wintex Knitting Mills, Inc.*, 610 F.2d 430 (6th Cir. 1979), where the court, in denying enforcement to the Board's Decision, *supra*, held that an employer could accept convincing evidence of majority status submitted by one of two rival unions where that evidence arose "without any help from the employer." Implicit therein is that, when the evidence of majority status is tainted by employer assistance, reliance is unwarranted and impermissible.

Respondent could not recognize the Shop Committee as its employees' exclusive collective-bargaining representative, it could not negotiate or execute a collective-bargaining agreement with it. By doing so, and by implementing new and improved terms and conditions of employment without notice to and bargaining with Local 662, Respondent has violated Section 8(a)(1), (2), and (5) of the Act. *Mid-Continent Refrigerated Service, supra.*

It follows from the foregoing that Burket's speech to the employees only 4 days prior to the RD election, alluding to the successful negotiations with the Shop Committee and its alleged better attitude, further undermined Local 662's majority status and interfered with the employees' right to cast an unimpeded ballot in forthcoming election in further violation of Section 8(a)(1) and (5) of the Act.

4. The representation case

As indicated above, I have found that Respondent engaged in conduct undermining Local 662's majority status, including encouraging employees to bargain directly with it without representation by that Union, and withdrew recognition from and refused to bargain with Local 662, all in violation of Section 8(a)(1) and (5) of the Act. I have also found that Respondent violated Section 8(a)(1), (2), and (5) of the Act by recognizing and bargaining with the Shop Committee and by signing and implementing an agreement with it. This conduct, I conclude, also interfered with the employees' exercise of their free choice in the election and warrants that that election be set aside.

However, inasmuch as the Regional Director has overruled challenges to ballots sufficient in number to affect the outcome of the election, I shall recommend that the representation case be remanded to him so that those challenged ballots may be opened and counted. In the event that the revised tally of ballots establishes that Local 662 has secured a majority of the valid votes cast, a certification of representative should issue so that Local 662 might enjoy the advantages attendant upon certification as well as a bargaining order. If it does not, I recommend that the election conducted on February 22, 1981, be set aside, the petition in Case 8-RD-968 be dismissed, and all proceedings in that case be vacated. *Case, Inc.*, 237 NLRB 798 (1978); *Rollins Telecasting, Inc.*, 199 NLRB 613 (1972), enfd. as modified 494 F.2d 80 (2d Cir. 1974).

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (2), and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent assisted and supported the Shop Committee by recognizing, bargaining, and executing a collective-bargaining agreement with it, I shall recommend that Respondent be required to withdraw and withhold recognition from the Shop Committee and to cease giving effect to the terms and conditions of the contract with said Committee, which became effective on January 22, 1981, or any renewal or extension thereof. Nothing in this recommended Order, however, shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, and conditions of employment which may have been established pursuant to the performance of the contract with the Shop Committee.

The General Counsel seeks, and of course Respondent opposes, the imposition of a bargaining order as the only way to adequately remedy the unfair labor practices found above. Such a remedy, the Supreme Court held in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. at 613–615, is appropriate in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had." It is also appropriate "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." As the Court stated (at 612):

> [A] bargaining order is designed as much to remedy past election damage as it is to deter future misconduct. If an employer has succeeded in undermining a union's strength and destroying the laboratory conditions necessary for a fair election . . . . [t]he damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.

Respondent's unfair labor practices, I am convinced, bring this case within the second category established by *Gissel*. The Union, which enjoyed the benefit of an unrebutted presumption of majority status, suffered the undermining of that status by a withdrawal of its recognition and by statements on behalf of Respondent calculated to convince the employees that they were no longer represented by the Union. The employees were encouraged to join concertedly among themselves to bargain with the Employer without the Union. And, when they did so, the product of that encouragement was quickly recognized and a contract was executed. The improved benefits stemming from that contract were implemented and the contract was held up, only days before the scheduled decertification election, as evidence of what the employees could achieve without the Union. Such a course of events, I believe, would not be readily rectified by traditional remedies short of a bargaining order. See *Michigan Products, Inc.*, 236 NLRB 1143 (1978), where an employer, shortly before a scheduled RD election, suggested and encouraged the employees to establish representatives to deal directly with management, thereby bypassing the Union; promised its employees that it would deal with such representatives; and further promised those employees benefits in order to undermine the incumbent union's status. The Administrative Law Judge, holding a *Gissel* bargaining order to be appropriate, noted particularly the difficulty of remedying a violation which involved the promise or grant of benefits. The Board's remedies, he noted, do not provide that benefits, even if granted unlawfully, must be retracted; benefits once granted, as here, "are not easily forgotten." The Board, in holding that the employer's conduct in *Michigan Products* constituted a refusal to bargain, noted:

> The incumbent union enjoyed the presumption of continued majority status and at all times relevant continued to demand recognition for the purposes of collective bargaining. Respondent fatally impeded the election process by engaging in unlawful conduct, touching all its employees, which was intended to and in fact did undermine the Union's majority status, thereby preventing the holding of a fair election.

See also *K&K Gourmet Meats, Inc.*, 245 NLRB 1331 (1979), enforcement denied in relevant part 640 F.2d 460 (3d Cir. 1981), where the Board held that "promises of a wage increase, increased benefits, and new approaches to resolve employee grievances, coupled with the threat that the organizational campaign would be futile," which gave the employees much if not all they sought by union representation, precluded the exercise of a free choice by the employees in an election. The Board pointed out that the granting of benefits to employees in order to influence them against choosing union representation rendered free choice in an election "a matter of speculation."

The question of a bargaining order remedy in the instant case in favor of Local 662 is complicated, however, by the presence of the Shop Committee and by the fact that the General Counsel did not allege that Respondent violated Section 8(a)(2) of the Act by interfering with, assisting, or supporting the Shop Committee in its formation or by dominating its existence. On the surface, at least, it would appear to be inconsistent with whatever remains of the Board's *Midwest Piping* doctrine to order Respondent to bargain with one union in the face of a question concerning representation, which the General Counsel acknowledged to be "real" and "valid," where a second unassisted and undominated union seeks representational rights. The existing case law is of little help in resolving this issue. Thus, in both *Federal Alarm, supra*, and *Mid-Continent Refrigerated Service, supra*, where the employers' conduct was very similar to Respondent's and bargaining orders were granted, the employee committees were found to be assisted, supported, and dominated by the employers and they were ordered disestablished. See also *World Wide Press, Inc.*, 242 NLRB 346

(1979), where an employer's interposition of a contract with a dominated labor organization as a defense to a *Gissel* bargaining order was rejected. Similarly, in *Lyman Steel Company*, 249 NLRB 296 (1980), the tainted evidence of majority support in favor of a massively assisted labor organization was held no bar to a bargaining order in favor of the other union, which had been on the receiving end of the employer's unfair labor practices.

On balance, I am convinced that a bargaining order in the instant case would best effectuate the purposes and policies of the Act and protect the rights and desires of the unit employees. Thus, Local 662 had retained, at all times, its majority status. The Shop Committee, whether alleged to be assisted or dominated within the meaning of Section 8(a)(2) or not, was in fact as much the product of the employer's unfair labor practices as were the committees in *Federal Alarm* and *Mid-Continent Refrigerated Services*. Respondent would be gaining the benefits of its wrongful conduct if its role in the creation and stimulation of the Shop Committee were ignored for remedial purposes. Moreover, Respondent was, at all times, fully apprised of the General Counsel's contention that a bargaining order was warranted in this case. Accordingly, I shall recommend that Respondent be ordered to bargain with Local 662, upon request.

Respondent's unfair labor practices were widespread, touched all of the employees, and spanned virtually the entire period from the withdrawal of recognition in July 1980 to the decertification election in February 1981. They demonstrate a general disregard for the employees' fundamental statutory rights and therefore warrant the imposition of a broad injunctive order precluding Respondent, its officers, agents, and successors from engaging in unfair labor practices "in any other manner." See *Mid-Continent Refrigerated Service, supra*, and *Federal Alarm, supra.*

CONCLUSIONS OF LAW

1. By prohibiting employees from talking about the Union and conditioning continued employment upon agreement to refrain from union activity, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. At all times since 1977, Local 662 has been and is now the representative for the purposes of collective bargaining of Respondent's employees in the following unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by Flex Plastics, Inc., excluding all office clerical employees, and professional employees, guards and supervisors as defined in the Act.

3. By withdrawing recognition from Local 662 in November 1980, unilaterally changing terms and conditions of employment, and by failing and refusing to bargain with the Union since that date, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. By misleading employees concerning Local 662's representative status and the status of the pending representation cases, by soliciting and encouraging its employees to bargain directly with it in derogation of Local 662's representative status, by recognizing and bargaining with a committee of the employees and executing and implementing a contract reached with the Flex Shop Committee without notice to or bargaining with Local 662, and by encouraging or soliciting its employees to support the Flex Shop Committee in the representation election on the basis of its bargaining with said committee and the contract executed and implemented with it, Respondent has undermined Local 662's majority status, has assisted and supported the Flex Shop Committee, and has engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (5) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the above findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[30]

The Respondent, Flex Plastics, Inc., Midvale, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Prohibiting talk about the Union in the plant or conditioning continued employment upon agreement to refrain from engaging in union activity.

(b) Refusing to recognize and bargain collectively with the Union, Shopmen's Local Union No. 662 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL–CIO, as the exclusive bargaining representative of Respondent's employees in following appropriate unit:

> All full-time and regular part-time production and maintenance employees employed by Flex Plastics, Inc., excluding all office clerical employees, and professional employees, guards and supervisors as defined in the Act.

(c) Undermining the majority status of the above-named Union, misleading employees as to that Union's representative status, misleading employees as to the status of pending representation cases, unilaterally changing the terms and conditions of employment, soliciting and encouraging its employees to bargain directly with Respondent, recognizing and bargaining with the Flex Shop Committee which was formed as a result of its solicitation and encouragement, executing or implementing contracts reached with the Flex Shop Committee without notice to and bargaining with the Union, and encouraging or soliciting its employees to support the Flex Shop Committee on the basis of its bargaining with that

[30] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto and shall be deemed waived for all purposes.

committee and the contract executed pursuant to that bargaining.

(d) Maintaining or giving any force or effect to the collective-bargaining agreement between Respondent and the Flex Shop Committee or any extension or modification thereof; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, or conditions of employment which may have been established pursuant to the performance of said contract.

(e) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following action which is necessary to effectuate the policies of the Act:

(a) Withdraw and withhold recognition from the Flex Shop Committee, or any successor thereto, as the collective-bargaining representative of the employees in the above-described unit.

(b) Forthwith rescind and cease giving effect to the collective-bargaining agreement entered into with the Flex Shop Committee, effective as of January 22, 1980, or any extension or renewal thereof; however, nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, or conditions of employment which may have been established pursuant to the performance of that agreement.

(c) Recognize Shopmen's Local Union No. 662 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, as the exclusive collective-bargaining representative of its employees in the aforesaid unit and, upon request, meet and bargain with it concerning the wages, hours, and other terms and conditions of employment, including the procedure for the recall of employees from layoff status, of said employees, and, if an agreement is reached, embody the same in a signed contract.

(d) Post at its plants in Midvale, Ohio, copies of the attached notice marked "Appendix."[31] Copies of said notice, on forms provided by the Regional Director of Region 8, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Mail copies of the attached notice marked "Appendix" to all of those employees who were laid off from plant #2 in January and February 1981.

(f) Notify the said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[31] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties were afforded the opportunity to present evidence, it has been found that we violated the National Labor Relations Act in certain respects and we have been ordered to post this notice and to carry out its terms.

The National Labor Relations Act gives you, as employees, certain rights, including the right:

To engage in self-organization
To form, join, or help a union
To bargain collectively through a representative of your own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all of these things.

WE WILL NOT do anything to interfere with you in the exercise of the aforementioned rights and all our employees are free to become or remain members of Shopmen's Local Union No. 662 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO.

WE WILL NOT prohibit our employees from talking about the Union in our plants.

WE WILL NOT threaten or imply that continued employment of any employee is contingent upon an agreement to refrain from union activity.

WE WILL NOT undermine the majority status of the above-named Union by attempting to make employees believe that the Union no longer represents them, by misrepresenting the status of NLRB representation proceedings, or by encouraging employees to join concertedly to bargain with us without that Union.

WE WILL NOT assist or support any lobor organization.

WE WILL NOT recognize or bargain with the Flex Shop Committee created on January 9, 1980, or any successor thereof, as the collective-bargaining representative of our employees.

WE WILL NOT refuse to recognize and, upon request, bargain with Shopmen's Local Union No. 662 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, as the exclusive representative of our employees in the appropriate unit described below.

WE WILL NOT change terms and conditions of employment without notice to and bargaining with the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities or the purpose of collective bargaining or other

mutual aid or protection, or to refrain from any and all such activities.

WE WILL withdraw and withhold recognition from the Flex Shop Committee as the collective-bargaining representative of our employees, and WE WILL cease giving effect to the contract we entered into with said committee, effective as of January 22, 1980, or any extension or renewal thereof; but we are not required to withdraw or eliminate any wage rates or other benefits, terms, or conditions of employment which we have given to our employees under said contract.

WE WILL, upon request, recognize and bargain with Shopmen's Local Union No. 662 of the International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO, as the exclusive collective-bargaining representative of our employees in the following unit, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, WE WILL embody such understanding in a signed agreement. The appropriate collective-bargaining unit is:

All full-time and regular part-time production and maintenance employees employed by Flex Plastics, Inc., excluding all office clerical employees, and professional employees, guards and supervisors as defined in the Act.

FLEX PLASTICS, INC.